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The Influence of the 2012 Restructuring of the Greek Public Debt on the Economic Governance of the Eurozone and on Public Debt Law

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Abstract

The Greek public debt restructuring that took place in 2012 through the twin scheme of the Private Sector Involvement (PSI) and the Official Sector Involvement (OSI) has had a major impact on the institutional structure of the EU economic governance. The retroactive introduction of Collective Action Clauses (CACs) into the Greek legal order that formed the legal basis for restructuring was adopted in art.12(3) of the ESM Treaty and is now a legal obligation of all Member States. The 2012 intervention was a "workshop" in the fields of European Law, International Economic Law and Public Debt Restructuring Law. The legal structure of the 2012 intervention has successfully undergone multiple judicial reviews (Greek Courts, Courts of other EU Member States, CJEU and EGC, ECtHR, ICSID). The Greek operation of 2012 was by far the largest restructuring of public debt, and at the same time a restructuring that was carried out with legal certainty, despite the involvement of many legal orders. It is therefore a point of reference for the future.

Introduction

The restructuring of the Greek public debt in 2012 was, in terms of magnitude, the largest in the world history of public debt restructuring[1]. Furthermore, it was a restructuring organised in a country member of the Eurozone-a monetary union inspired by a fundamental refusal to accept monetary financing and the bail out of its Member States. This was, therefore, an exceptional restructuring by European standards.

The whole operation was designed by the Greek authorities in close co-operation with the Eurozone Member States at Eurogroup level because its required funding had to be secured through the second rescue programme for the Greek economy; in particular, through the European Financial Stability Facility (EFSF) loan to the Hellenic Republic. Greece, however, had the legal "ownership" of the whole operation, and undertook, via the EFSF loan, its financial cost, precisely because it was going to benefit-and it did benefit-from its outcome.[2]

The 2012 restructuring is, therefore, exceptional not only because it concerns a member country of a monetary union, but also because it was fully funded by institutional creditors (EFSF-effectively, the other

* Professor of Constitutional Law. Former Deputy Prime Minister and Finance Minister of the Hellenic Republic (2011–12), former Deputy Prime Minister and Foreign Affairs Minister (2013–15). An initial version of this paper was the Keynote speech at the INSOL - Europe, Annual Congress 2018 that was held in Athens in October 2018.

[1] J. Zettelmeyer, C. Trebesch and M. Gulati, "The Greek Debt Restructuring: An Autopsy" *Working Paper 13–8* (July 2013), available at: *https://econpapers.repec.org/paper/iiewpaper/wp13–8.htm* [Accessed 24 February 2020] .

[2] European Stability Mechanism (ESM), *Annual Report* (2014), pp.28–30; ESM *Annual Report* (2015), pp.30–35. *Explanatory Report for the State Budget 2017* (November 2016), p.131 (re the inspective reduction of annual interest thanks to the PSI).

monetary union Member States). These combined characteristics made it possible to organise a voluntary private sector involvement (PSI) and a consensual official sector involvement (OSI).

Apart from its impact on Greece's financial situation, the preparation and conduct of the 2012 restructuring significantly affected the changes that were brought about in the economic governance of the Eurozone following the crisis which began in 2008 and led several Member States to resort to rescue programmes.[3] It also affected the interpretation and application of the law governing public debt and its restructuring.[4]

The main argument of the present study is that Greece functioned as a "laboratory", in which the scheme of the retroactive introduction of Collective Action Clauses (CACs) into the national legal order of an EU and Eurozone Member State was tested. Greece is also a Member State to the European Convention on Human Rights and a number of bilateral and multilateral investment protection conventions. The scheme of retroactive introduction of CACs has already been adopted by art.12(3) of the ESM Treaty and has now become legally binding for all Member States.[5] The financial size and legal organisation of the 2012 Greek public debt intervention is a precedent that has been judicially reviewed at all levels of jurisdiction (national, European, international) and has influenced not only the evolution of EU economic governance, but also the interpretation of the ECHR and international economic law in the field of investments protection. The Greek precedent must now be seriously considered by public debt restructuring law.

The financial structure of the 2012 Greek Public Debt Intervention

The 2012 intervention is usually identified with the large nominal haircut of that part of the Greek public debt which was held by private entities in March 2012: the so-called PSI. It would be more accurate to say, however, that this was a multi-dimensional intervention which included:

(a) The PSI, which we will discuss in detail below.

(b) The involvement of the official sector, namely the OSI, which meant a reduction, in present value terms, through various arrangements, of that portion of the Greek public debt which was held by the official sector (the EFSF/ESM and the other Member States of the Eurozone under the scheme of the Greek Loan Facility). Following the 2012 restructuring, the portion of the debt held by the official sector increased overwhelmingly as a percentage of the total Greek public debt; this way, the contribution of OSI ultimately became greater than the contribution of the PSI[6]. The contribution of OSI has a long-term potential reaching up to 2060, following the short- and medium-term measures agreed after 2015, and will probably be further extended in the future within the Eurozone in order to ensure the long-term viability of the Greek public debt.[7]

[3] K. Tuori and K. Tuori, *The Eurozone Crises: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2014). E. Venizelos, *State Transformation and the European Integration Project: Lessons from the Financial Crisis and the Greek Paradigm*, Centre for European Policy Studies (CEPS), Special Report No.130 (February 2016).

[4] Allen and Overy, "How the Greek debt reorganization of 2012 changed the rules of sovereign insolvency" (September/October 2012).

[5] See "The legal organisation of the 2012 intervention in the Greek legal order-retroactive introduction of CACs and determination of eligible bonds", below.

[6] See ESM, *Annual Report* (2014), pp.28–30; ESM *Annual Report* (2015), pp.30–35.

[7] F. Colasanti, "Financial Assistance to Greece: Three programs", European Policy Centre, Discussion Paper (February 2016). Continuous updating is available at "*Greece-ongoing program ESM/EFSF*", esm.europa.eu. The official position of the Hellenic Republic presented by PDMA (June 2018), is available at *http:\www.pdmx.gr/attachment /article/1567* [Both accessed 14 February 2020].

(c) The buy-back of part of the post-PSI bonds (in fact, of what was left after the PSI) at a proportion of their nominal value. This operation took place in November 2012 and mainly concerned post-PSI bonds held by Greek systemic banks in their portfolios.[8]

These interventions held in 2012 reduced: (1) the nominal debt by €106 billion, an amount corresponding to more than 50 per cent of the GDP; (2) the outstanding debt, in terms of present value, by 49 per cent of the 2013 GDP; and (3) the annual interest paid by Greece by 60 per cent compared with the level of interest in 2011. The net reduction in the nominal value of the debt is the combined result, first of all, of the PSI (excluding the nominal reduction in intra-governmental debt) and. second, of the debt buy-back. The return to Greece of the Eurosystem's profits from the Greek sovereign bonds included in the portfolios of the SMP and ANFA programmes, counts as part of the OSI and thus reduces the present value of the remaining debt, whose bearer is mostly the official sector.[9]

During the same period, Greece assumed public debt by taking the EFSF loan, which was a key component of the second rescue plan. This loan funded the voluntary bond exchange incentive that laid at the core of the PSI.[10] Further below, we will discuss exactly how this structure has been shaped. It is argued that all public expenditure on the recapitalisation of systemic banks (€25 billion) and the dissolution of non-systemic banks (€14 billion) has to be included in the debt assumed by Greece after the PSI. However, both the recapitalisation and the dissolution were not only due to the decrease in the value of the Greek government bonds' portfolios held by the Greek banks, but also due to non-performing loans and financial exposures. After all, post-PSI bonds portfolios developed significant dynamics, which could also be boosted by the cash equivalent received by Greek banks owing to PSI, while the Greek State, through the recapitalisation, acquired a portfolio of Greek systemic banks' stocks that were estimated to yield €16 billion. This amount was already covered on the basis of the stock market value of Greek systemic banks in 2014, before the European elections, and in particular before the January 2015 national elections.[11]

This structure of the 2012 intervention on the Greek public debt is based on a series of fundamental political agreements reflected in the conclusions of the European Council (of 21 July 2011 and 26–27 October 2011) and in statements made by the Eurogroup at a series of meetings (with the most significant being the one held on 21 February 2012 and its complementary meeting in November 2012).[12] The said structure was the subject of a tough and difficult technical and political negotiation by the Greek Government, at the level of the Prime Minister and of the Minister of Finance, first with the other Eurozone Member States and European Institutions (the official sector), and second with the representatives of the most important (size-wise) bearers of Greek government bonds owned by the international private sector. These were mainly banks, via the Institute of International Finance (IIF) and the steering committee of the Private Creditors/Investors Committee. Finally, as already noted, this structure was organised, legislated and implemented by the Hellenic Republic with the financial support of its European partners, through a concessional loan granted by the EFSF.

[8] See Eurogroup Statement on Greece (27 November 2012), *https://www.consilium.europa.eu/uedocs/cms_Data /docs/pressdata/en/ecofin/133857.pdf* [Accessed 14 February 2020].

[9] See Eurogroup Statement (21 February 2012).

[10] Eurogroup Statement (21 February 2012), notes 1 and 2.

[11] See M. Mavridou, A. Theodosiou and T. Gklezakou, "Greece: Several Greek Banks and Foreign Branches: Resolution via Public Recapitalization and Bail-in and State Aid Issues (2009–2015)" in World Bank Group/Financial Sector Advisory Center, "Bank Resolution and 'bail in' in the EU: Selected Case Studies Pre- and Post-BRRD" (12 December 2016), pp.29–34. See also Hellenic Financial Stability Fund, "Announcement, Interim Financial Statements for the 9-month period ended 30/09/2014" (December 2014).

[12] See Eurogroup Statement on Greece (27 November 2012), *https://www.consilium.europa.eu/uedocs/cms_Data /docs/pressdata/en/ecofin/133857.pdf* [Accessed 14 February 2020] and fnn.8 and 9.

It should be recalled that the Greek public debt, which has reached €325 billion, comprises only 2 per cent of the total public debt of the Eurozone Member States.[13] Although exceptional, the 2012 intervention was an integral part of the broader operation of overcoming the Eurozone crisis through changing the institutional framework of its economic governance by major steps: on the one hand, by the amendment of art.136 TFEU and, on the other hand, with the Treaty establishing the ESM and the Treaty on Stability, Coordination and Governance, which fall under the field of international economic law, in tandem with the EU legal order.[14]

All these features made it possible for the 2012 Greek debt intervention to be completed with financial and legal safety, despite its huge size and the complexity of financial engineering that was applied to its design and execution.

The 2012 intervention made the Greek public debt entirely sui generis. This is a public debt-about 85 per cent of which is held by the European official sector-which has been agreed on favourable terms as regards interest rates, average maturity, grace period and repayment dates. In other words, it is a public debt that is largely held outside the markets.[15] Institutionally, it is a public debt that, in spite of its very high nominal size as a percentage of GDP, has very low service costs-far less than what would correspond to its volume under market conditions.

These features put the sustainability of Greek public debt under the institutional (i.e. political) control of the creditors of the official European sector, namely, the EFSM/ESM, the Eurozone Member States and-to a certain extent-the ECB and the Eurosystem (always subject to their independence and special institutional role).

A key element of the 2012 intervention was the explicit commitment of the Eurozone Member States to the Eurogroup (in February and November 2012) that, if needed, there would be additional measures to ensure long-term sustainability. These measures would be specified as soon as Greece achieved a primary budget surplus, which happened in 2013. Despite the dramatic retreat of 2015, such measures have been partly agreed upon by the Eurozone Member States. However, the issue of sustainability has now been referred for re-examination in 2032; until then, Greece will be subject to a very tight fiscal control framework based on achieving high primary surpluses (3.5 per cent of GDP by 2022 and about 2.2 per cent of GDP per year thereafter).[16]

The legal organisation of the 2012 intervention in the Greek legal order—retroactive introduction of CACs and determination of eligible bonds

From a legal point of view, the 2012 intervention and especially PSI was set up in the domain of Greek law which, except for a few issues, applied to the bonds issued by the Greek State, or to loans the latter had taken until then. The only legislative provision enacted by the Greek Parliament with retroactive effect was to introduce the Collective Action Clauses (CACs) of the holders of each issue's bond.[17] Under this provision, Greek law was broadly aligned with English law and the law of New York, which are the legal

[13] Statista, *"The Statistics Portal: National debt in the member States of the European Union in the 1st quarter 2018"*.

[14] See Tuori and Tuori, *The Eurozone Crises* (2014).

[15] J. Schumacher and B. Weder di Mauro, "Diagnosing Greek Debt Sustainability: Why is it So Hard?", Brookings Papers on Economic Activity, BPEA Conference (10–11 September 2015). See also P. Kazarian, "Greece's Government Accounting: 'The Biggest Lie in the Century'", *The Accountant*, 21 December 2016.

[16] Colasanti, "Financial Assistance to Greece: Three programs", European Policy Centre, Discussion Paper (February 2016).

[17] See Allen and Overy, "How the Greek debt reorganization of 2012 changed the rules of sovereign insolvency" (October 2012); C. Keller, "Lessons learned from the use of CAC in the Greek PSI", Deutsche Bundesbank/Euro system (28 June 2012).

orders governing the overwhelming majority of sovereign and corporate bonds under conditions of internationally accepted legal certainty.[18]

I recall that the joint Merkel-Sarkozy Declaration in Deauville in October 2010 highlighted the individual risk of every Eurozone member country with regard to its sovereign bonds and public debt.[19] Eurogroup's insistence on the need to introduce collective action clauses in the legal orders of all Member States was also prominent. In the end, the Treaty establishing the ESM explicitly provided for (in art.12(3)) an obligation for all Member States to introduce collective action clauses into their national law governing the issuance of bonds. Thus, the collective action clauses of government bond bearers were, first of all, explicitly stipulated in a multilateral convention of international economic law and, then, became an element common to the national laws of all EU Member States.

These regulatory changes increase awareness of the relevant risks involved, which is necessary for anyone wishing to participate in the primary and secondary government bond markets. They also underline the diversification of the risk as to the sovereign debt issued by each Eurozone Member State separately, resulting in the differentiation of interest rates and returns between Member States on the basis of the budgetary and macroeconomic performance of each of them. They therefore constitute a significant change in the system of economic governance of both the Eurozone and of the individual Member States, but also the convergence of the relevant regulations of national laws not only at intra-European level, but also internationally.

The Greek Parliament legislated also on the perimeter of the bonds that would be eligible for voluntary exchange with new (post-PSI) bonds.[20] Putting it simply, the financial and legal form of the PSI provided for the exchange of existing bonds with new bonds at a nominal haircut of 53.5 per cent, but with a financial incentive in the form of a cash equivalent. This should be viewed in the context of the position of Greek bonds in the market at that time and of the imminent risk of disorderly default. More specifically, the scheme involved the exchange of old bonds with new bonds corresponding to 31.5 per cent of their initial nominal value and the immediate payment of 15 per cent of the nominal value of the old bonds (in cash equivalent under the form of EFSF bonds). The exchange was voluntary and addressed the holders of each issue collectively; the latter had to decide with quorum and an increased majority laid down by the law on the application of the CACs.

The relevant decisions of the Greek Council of State (Supreme Administrative Court) and of the ECtHR (European Court of Human Rights) that will be discussed below offer a forensic insight into the structure of the PSI. This was provided for in Law 4050/2011, passed by the Greek Parliament, in the administrative acts adopted for implementing said law and in the call by the Greek Public Debt Management Agency for a voluntary exchange.[21] This arrangement was agreed with the other Eurozone Member States and the European Institutions at the level of the Eurogroup and was the subject of discussions between the Greek Government and representatives of the international private sector-the banks (IIF), in particular. However, the only legally binding acts were those of the Hellenic Republic, and preliminary discussions with representatives of the international private sector did not prejudice the bearers' individual participation

[18] L. Buchheit and G. Mitu Gulati, "Sovereign Bonds and the Collective Will" (2004) 51 *Emory Law Journal* 1317. L. Buchheit, M. Gulati and I. Tirado, "Reprofiling Sovereign Debt, 30.11.2014", scholarship.law.duke.edu [Accessed 14 February 2020]. See also T. Martinelli, "Euro CAC and the existing rules on sovereign debt restructuring in the Euro area: an appraisal four years after the Greek debt swap", *ADEMU Working Paper Series 2016/043* (2016). On the development of the idea of introducing CAC in the legislation of the Euro Area Member States, see M. Audit, "A Debt Restructuring Idea" in C. Paulus (ed.), *A Debt Restructuring Mechanism for Sovereigns: Do We Need a Legal Procedure?* (Baden-Baden/Munich/Oxford: C.H. Beck-Hart Publishing-Nomos, 2014).

[19] See the Franco-German Declaration, Deauville, 18 October 2010. See indicatively A. Mody, "The Ghost of Deauville", Vox Cepr's Policy Portal (7 January 2014).

[20] See Zettelmeyer et al., "The Greek Debt Restructuring: An Autopsy" (July 2013).

[21] See Hellenic Republic, Ministry of Finance Press Release (24 February 2012).

in the PSI scheme; this was voluntary and based on each bearer's own assessment of the data and of the exchange proposal with its accompanying terms. Besides, in order for the PSI scheme to be implemented, a quorum was required and an increased majority was demanded by the CACs. On the other hand, participation in the process and the quorum, logically and legally, led to the acceptance of the decision of the increased majority by the minority as well.[22]

The legislative determination of selected bonds fully complied with the pari passu clause, as it included all bonds other than those held by the ECB and the Eurosystem and the EU Institutions in the context of their special institutional role, rather than under market conditions. General government agents in Greece were treated as private parties, precisely so as to fully respect the rule of pari passu.[23]

The Assemblies of the bearers of each issue were organised electronically, with the Bank of Greece as administrator. In all issuances under Greek law, the quorums and the increased majorities that were necessary for the CACs and for the voluntary exchange of old bonds with new post-PSI bonds to take effect, according to the financial structure presented above, were formed. Bearer participation reached 96 per cent of the eligible bonds and loans. However, there were also issuances (under foreign law) in which bearers did not accept the voluntary exchange and held the old bonds until their maturity (hold out).[24] In all such cases of holding, the Hellenic Republic honoured and continues to honour its obligation and pays the old bonds at maturity without any credit event taking place.

Legal issues caused by the 2012 public debt intervention—judicial review in five different jurisdictions

The fact that the 2012 intervention took the simple form of retroactive introduction of CACs and legislative definition of exchangeable bonds in the Greek legal order did not, of course, prevent legal disputes from arising in every possible field. Let us give a succinct overview, recalling some things already known.

In the Greek legal order, the judicial challenge concerned the potential unconstitutionality of the relevant law and the possibility of its running contrary to the ECHR and the latter's First Additional Protocol. More specifically, it addressed potential violations of:

(a) The right to property and the right to peaceful enjoyment of one's possessions (Article 17 of the Greek Constitution and art.1 of the ECHR's (First) Additional Protocol) on account of the application of the CACs which made the exchange of bonds for minority bearers obligatory (and hence equivalent to expropriation), as opposed to voluntary. Nevertheless, as we have seen, many bearers participated without reservations in the process and formation of the necessary quorum.

(b) The principle of equality (art.4(1) and (5) of the Greek Constitution) and the principle of equal treatment and non-discrimination (art.14 of the ECHR) among bearers in different versions. In particular, the alleged breach of the principle of equal treatment related to the different legal treatment of individuals and private entities that were subject to the CACs and the exchange proposal from that afforded to the European official sector (mainly the

[22] See Buchheit and Gulati, "Sovereign Bonds and the Collective Will" (2004) 51 *Emory Law Journal* 1317; Buchheit, Gulati and Tirado, "Reprofiling Sovereign Debt" (30 November 2014), *https://scholarship.law.duke.edu/* [Accessed 14 February 2020]. See also Martinelli, "Euro CAC and the existing rules on sovereign debt restructuring in the Euro area: an appraisal four years after the Greek debt swap", *ADEMU Working Paper Series 2016/043*. On the development of the idea of introducing CAC in the legislation of the Euro Area Member States, see Audit, "A Debt Restructuring idea" in Paulus (ed.), *A Debt Restructuring Mechanism for Sovereigns* (2014).

[23] R. Olivares-Caminal, "he Pari Passu Clause in Sovereign Debt Instruments: Developments in Recent Litigation", BIS Paper No.72 (2013), pp.121–128.

[24] See L. Buchheit, M. Gulati and I. Tirado, "The Problem of Holdout Creditors in Eurozone Sovereign Debt Restructurings", Paper prepared for presentation at the European University of Cyprus (Nicosia) (30 January 2013).

ECB), in light of the fact that the bonds held by the Eurosystem were excluded from the exchange. The alleged breach of the principle of proportionate or differential equality concerned the equal treatment between business-oriented investors and the savers or those to whom the Greek State had paid its debts in the form of bonds and who the law had to differentiate from investors.

(c) The principle of proportionality (art.25(1) of the Greek Constitution). Here the argument was that the inclusion of small bearers who were not enterprises, but natural persons holding bonds with a value of up to €100,000, which is the limit of protected bank deposits, was disproportionate to the intended public benefit.

(d) The principle of legitimate expectations and legal certainty, on account of the retroactive introduction of CACs that bound minority bearers as well. These bearers expected to collect their bonds' value at maturity, with the negative curve of the old bonds in the secondary market (which improved after the PSI) being a fact and the Greek State's default, in case the 2012 intervention to the public sector debt were unsuccessful, being possible.

Thus, proceedings were initiated before the Greek Council of State regarding the overall constitutionality of the intervention and, more specifically, of the PSI; I am not referring here to any claims of holders who acquired their bonds in the secondary market through the intermediation or suggestion of credit/financial institution, due to a breach of the information obligations.[25] The above unconstitutionality allegations were rejected by the Plenary Session of the Greek Council of State, without a request for a preliminary ruling being submitted to the CJEU.[26] The Greek Council of State ruled, by a majority vote, that the right to the protection of property and, in particular, expropriation under art.17 of the Greek Constitution was not violated; this was because, according to the Court, the limitation of the said right and of the right to enjoyment of possessions was provided for by law, served an overriding public interest, and did not go beyond what was necessary. In that way, the Greek Council of State offered not only an interpretation of the Greek Constitution, but also of art.1 of the First Additional Protocol of the ECHR. The Court also ruled that the legitimate expectations and legal certainty of the applicants were not breached in view of the—well known to them—fiscal situation of the Hellenic Republic, which could lead to a credit event and bankruptcy, on the one hand, and to the fluctuation of Greek government bonds in the secondary market at very low levels, on the other. The Court also ruled that the relevant national legislation safeguarded the applicants' procedural rights. On similar grounds, the allegation for breach of the proportionality principle was ruled out. As regards the allegations of the violation of the principle of equality and the proportionately equal participation of citizens in public burdens, the Court accepted the distinct institutional

[25] See A. Bolos, "Credit rating evaluations and banks' information obligation upon the placement of Greek State bonds: a critical approach of article 26 par. 6 of law 3606/2007" (2016) 16 *Private Law Annals (Chronika Idiotikou Dikaiou)*13; judgment of the Athens Small Claims Tribunal (Irinodikeio) No.3903/2018.

[26] Council of State (Plenary) judgment No.1116/2014. A dissenting opinion (point 28 of the judgment) of four judges (out of a total of 25) was in favour of referring a preliminary ruling to the CJEU on the interpretation of art.63 TFEU and on whether legislation such as the one in question complies with the free movement of capital; in the case of an affirmative reply, if they are in accordance with the principle of proportionality. That dissenting opinion also referred to the judgment of the CJEU in *Commission v Belgium* (C-478/98) EU:C:2000:497; [2000] 3 C.M.L.R. 1111. The explicit provision of art.12(3) of the ESM Treaty, to which we have already referred, seems to make that question irrelevant, in my opinion. See, relatedly, G. Skiada, "he Greek Debt Restructuring Program and Buy-back Schemes of 2012 under Judicial Review by the Supreme Administrative Court (Judgments 1116/2014 and 1117/2014)" (2016) 1 *European Politeia* (Digital Edition). D. Tsibanoulis and I. Anagnostopoulos, "The Greek PSI and the Litigation Surrounding it" (2014) 2 *Revue international des services financiers/International Review of financial services* 18. A. Chiotellis, "Sovereign Debt Restructuring and the Internal Legal Framework: The Greek Experience" in C. Paulus (ed.), *A Debt Restructuring Mechanism for Sovereigns* (2014). For a comprehensive presentation of the evolution of disputes that the Greek PSI caused, see S. Grund, "Enforcing Sovereign Debt in Court-A Comparative Analysis of Litigation and Arbitration following the Greek Debt Restructuring of 2012" (2017) 1 V.L.R. 34.

role of the ECB's portfolio and of the Eurosystem, justifying the exemption from the exchange of bonds; however, it rejected the differentiation of individual bearers with a mixed portfolio, both in relation to other bearers and in relation to those who deposited their savings in banks without entering the bond market, which has its own risks.

Thereafter, the same claims were put forward before the ECtHR, where they were once more rejected.[27] The ECtHR ruled that participation in bond trading through CACs was not voluntary for minority bearers, but mandatory. However, it was provided for by law, it served public interest and was not disproportionate. The Court therefore decided that there was no violation of art.1 of the (First) Additional Protocol as regards property and peaceful enjoyment of possessions. It also found, on grounds similar to those of the Greek Council of State ruling on the non-infringement of the principle of equality, that art.14 of the ECHR, in conjunction with art.1 of the (First) Additional Protocol, was not infringed.

The common denominator of the position of the ECtHR and the Greek Council of State is the judicial self-restraint they have shown. The Greek Council of State has acted within the framework of the Greek judicial review system,[28] which is ostensibly a system of diffuse, incidental and specific control, but in practice it concentrates control in the hands of the three Supreme Courts (Council of State, Areios Pagos/Court of Cassation, Court of Auditors). The ECtHR checked the compatibility of Greek legislation concerning the public debt restructuring after all domestic remedies had been exhausted, thus knowing that the relevant Greek legislation had been found to be in conformity with the national constitution. In all jurisdictions, the judge, when called upon to review complex financial issues and fundamental economic and fiscal policy measures, which have already been implemented and produce results, hesitates to challenge the legislator's choices and make a decision that may have unforeseen financial, political and institutional implications or become de facto inapplicable. Since the New Deal era and the path that the case law of the US Supreme Court has followed and the point at which it has finally settled, judicial restraint on such matters has proved to be the safest and most prudent attitude.[29] It is an attitude that ensures the separation of powers, the authority of the judicial power and its effectiveness when issues concerning the rule of law and political and social liberalism are at stake.

At this point, it should be noted that a possible bankruptcy of Greece in the event of failure to service the public debt or in the event of failure to repay bonds at maturity and, much more, any credit event triggering derivative products of the Greek government bonds, such as credit default swap (CDS), is not determined or judicially declared by a national, European or international court. This is an evaluation which, while being capable of producing catalytic consequences for the functioning, the existence and, of course, for the sovereignty of a State, for the respective national economy and for the citizens, it is carried out by private bodies that have de facto power in the context of self-regulated conduct of the basic factors of the international market. In practice, the relevant decisions are taken by the International Swaps and Derivatives Association Inc (ISDA), in which all major private entities in the international derivatives

[27] *Mamatas v Greece*, 21 July 2016, final 30 January 2017 (ECtHR).

[28] See E. Spiliopoulos, "Judicial Review of Legislative Arts in Greece" (1983) 56 Temp. L.Q. 463.

[29] On the complexity of legislative choices in the field of financial policy and on a judge's self-restrictive disposition see L. Fuller's always relevant study, "The Forms and Limits of Adjudication", first published in 1957, but republished in (1978) 92 *Harvard Law Review* 353, especially 394 ("Polycentric Tasks and Adjudication"). From the recent bibliography, see P. Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Oxford: Hart Publishing, 2018), and especially p.56 onward. From the Greek discourse, see E. Venizelos, "National Constitution and National Sovereignty in Times of International Economic Crisis-The problem has been and remains political, rather than constitutional" (2011) 1 Efimerida Dioikitikou dikaiou (*Journal of Administrative Law*) 4 (in Greek). A. Vlachogiannis, "The Constitutionality of the 'Memorandum' in the Light of the (American) Theory of Judicial Self-Restraint" (posted 22 March 2011; in Greek), contitutionalism.gr; G. Gerapetritis, "Review of Financial Choices by the Judge: New Deal Views", constitutionalism.gr (posted 28 July 2011, in Greek).

market participate. Thus, a private platform organised as an association, as a non-governmental organisation, makes decisions that are extremely critical for sovereign states, their public debt and their access to markets.

As far as Greece and the 2012 public debt intervention are concerned, the ISDA committees were asked to assess, among other things, the retroactive introduction of CACs, the bond exchange proposal, and which of these developments constituted a credit event and led to the activation of CDS by organising a relevant auction, etc. Obviously, the financial and legal organisation of the PSI and the 2012 intervention in the Greek public debt, in general, had seriously to take into account the rules that ISDA has established as an international private association and the "jurisprudence" of its committees.[30] For this reason, it was particularly important to insist on the strict application of pari passu and not to exclude all private bond holders, regardless of whether they were legal persons or individuals and regardless of the size of their portfolios.

ISDA and its actual influence on the international bond market are evidence of the decline in state sovereignty, as well as of the privatisation and internationalisation, at the same time, of the national state and any other issuer of bonds, such as the EFSF, the ESM, etc.[31] In this sense, the legal framework behind the 2012 intervention and, specifically, the PSI, as formulated by the Hellenic Republic, was absolutely necessary in order to protect an overriding public interest; that is to say, the very fiscal and general financial status of the State. It was also formulated for the protection of the democratic institutions and guarantees of the rule of law that would be seriously tested in the event of a disorderly default.

Historically, public debt has been named "sovereign", precisely because the borrowing capacity of the state and its indebtedness towards other States as well as towards markets was an expression of its sovereignty. The Greek nation, shortly after the outbreak of the Revolution of Independence against the then Ottoman Empire in 1821, secured the first loans in London from the capital market of that time, the so-called "independence loans". Regardless of the abusive terms, the conclusion of those loans itself, even before the international recognition of the new Greek State, was an act of indirect recognition of its status as a subject of international law. Two hundred years later, the blocking of Greece's access to the markets and compulsory borrowing from the IMF and other Eurozone Member States (subsequently by the EFSF and the ESM) were in fact a contestation of the sovereignty of the state, which had to be entered into rescue programmes. The relationship between state sovereignty and market access therefore brings together, from the outset, the most public and most private element, the statehood of the national state and the speculative perception of the international market facing states' financing needs as a commercial opportunity.[32]

Let us return, though, to the position taken by the case law:

The EU General Court (EGC), and subsequently the CJEU, dealt, first of all, with procedural issues on the legal nature of PSI (to establish whether the relevant disputes were administrative or private ones) and with the way in which the proceedings were handled.[33] Secondly, they dealt with questions of EU civil

[30] ISDA, News Release "ISDA EMEA Determinations Committee: Restructuring Credit Event has occurred with Respect to the Hellenic Republic" (London: 9 March 2012).

[31] See, in more detail, Venizelos, *State Transformation and the European Integration Project*, Centre for European Policy Studies (CEPS), Special Report No.130 (February 2016), pp.13–18.

[32] Venizelos, *State Transformation and the European Integration Project*, Centre for European Policy Studies (CEPS), Special Report No.130 (February 2016), pp.13–18.

[33] See *Hellenische Republik v Kuhn* (C-308/17) EU:C:2018:911; [2019] 4 W.L.R. 49, where the Court found that Regulation "Brussels Ia" does not apply to the dispute in question (exchange of bonds, PSI, CACS), because such a dispute does not fall within "civil and commercial matters" within the meaning of the said Regulation. The origin of such a dispute stems from the manifestation of public authority and results from the acts of the Greek State in the exercise of that public authority. Retroactive introduction of a CAC pursues a public interest objective: restructuring of the public debt/preventing the risk of failure of the restructuring plan/of a failing to pay decision/ensuring the financial stability of the Euro area. *Fahnenbrockand v Hellenische Republik* (C-226/13) EU:C:2015:383. J. von Hein

liability for acts or omissions on the part of the Commission[34]: the latter monitors the procedures of EFSF and ESM (separate legal entities in relation to the EU) and participates in the Eurogroup, which politically shaped the framework of financial support to Greece for an intervention on the debt (although such intervention constituted a legal "property" of the Hellenic Republic). The same happened with the ECB, which did not participate in the legal organisation of the PSI but was excluded therefrom because of the institutional functioning of the Member States' sovereign bond portfolio held by it.[35]

In the courts of other Member States (in particular those of Germany and Austria), claims were brought against the Hellenic Republic, but they crashed against the principle of state immunity.[36] Claims for damages against other Member States before their own national courts due to these Member States' participation in the political decisions of the Eurogroup were unsuccessful, as the PSI was legally organised by Greece, via an amendment of Greek national legislation and administrative acts issued by the Greek Administration.

Finally, at the level of bilateral and multilateral investment protection and at the ICSID forum, such claims were rejected on the grounds that acquisition of government bonds financing the state budget does not constitute a protected investment, per the multilateral Washington Treaty and the bilateral Treaty on mutual protection of investments (between Greece and Slovakia, Greece and Cyprus).[37]

The 2012 intervention on the Greek public debt as a laboratory for addressing the relevant issues at European and international level

The 2012 intervention did not, therefore, lead only to a change in Greek law on public debt and sovereign bonds. It functioned as a laboratory for addressing the relevant issues at European and international level. We have already mentioned the explicit provision for the introduction of CACs included in art.12(3) of the ESM Treaty. The 2012 intervention has enriched the relevant case law and has led to the adoption of judgments that are an interpretative innovation in terms of bond law, public debt restructuring, investment protection and property rights. Critical issues regarding the relationship between the national legal order and the EU Institutions, as well as parallel mechanisms that are critical to the economic governance of the Union, but are provided under international economic law (such as the ESM / EFSF and so on), have been clarified.

At the level of the Eurozone, owing to the 2012 intervention, the country risk of each Member State has been highlighted separately, as the bearers were called through the CACs procedures to weigh the data on the Greek economy and the prospects of Greece's sovereign bond portfolio against the country's fiscal outlook. The Eurozone determined in a very clear manner the short-, medium- and long-term framework in which its financial support to Greece (OSI) would be launched. However, the successful completion of the PSI was a prerequisite for the completion of the OSI and the smooth start of a new period that would lead-as it did-to additional debt interventions in the form of complementary OSIs.

and A. Gialeli, "The procedural Impact of the Greek Debt Crisis: The CJEU Rules on the applicability of Service Regulation", Conflict of Laws.net.

[34] *Ledra Advertising v Commission and ECB* (C-8/15) EU:C:2016:701; [2017] C.M.L.R 35.

[35] *Accorinti v ECB* (T-79/13) EU:T:2018:365; *Nausicaa Anadyomène SAS and Banque d' escompte v ECB* (T-749/15) EU:T:2017:21.

[36] S. Grund, "The Legal Consequences of Sovereign Insolvency-A Review of Creditor Litigation in Germany Following the Greek Debt Restructuring" (14 May 2017), *Maastricht Journal of European and Comparative Law*, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2968029* [Accessed 16 February 2020].

[37] International Centre for Settlement of Investments Disputes, Award in the Arbitration Proceedings between Postova Banca AS and Istrokapital SE and the Hellenic Republic, ICSID Case No.ARB/13/8 (9 April 2015); and International Centre for Settlement of Investment Disputes, Decision on Postova Banca's Application for Partial Annulment of the Award (29 September 2016).

On the other hand, the successful completion of the PSI with the retroactive and definitive incorporation of CACs into Greek law made it virtually necessary to issue new Greek sovereign bonds under English law, which is not under the control of the future Greek legislator, but includes CACs.

Country risk has been highlighted, and limits have been imposed as to the financial solidarity of the Eurozone Member States towards Greece, which has been characterised as an "exceptional and unique" case. What has been further highlighted by the special treatment of the ECB and of the Greek sovereign bond portfolio has been the importance of quantitative easing programmes and of ECB's intervention in the secondary market of Member States' bonds-whether these are applied on a large scale (e.g. QE), or have been enacted and are available as an option (e.g. OMT). The related strong dispute before the German Federal Constitutional Court and before the CJEU (the *Gauwailer* case[38]) is of great practical importance because it legally ensured the operation of mechanisms that do not lead to debt mutualisation, but equip the ECB with those intervention instruments available to all central banks that exercise monetary policy, such as the Fed and the Bank of England.

Moreover, after 2010, Greece has been acting as a lever for changes that have been made-in a fairly rapid way for European standards-in the primary and secondary law of the EU, or through parallel multilateral agreements in the field of international financial law. Such changes have been effected in order to introduce mechanisms for the avoidance or, at the very least, for the effective management of the EU and the Eurozone, which, until 2010, were structured for normal conditions and linear developments only, without providing for the likelihood of crises and retreats.

Final remarks

The 2012 intervention on the Greek public debt, as a legal and financial scheme, has therefore exerted and continues to exert more influence than it appears, not only on the course and prospects of the Greek economy, but also on the economic governance and prospects of the Eurozone. It has obviously influenced the law and practice of public debt restructuring internationally. The case law of the CJEU, of the ECtHR, of the ICSD Tribunal and of the national supreme courts in EU Member States concerning the restructuring of the Greek public debt has now become a corpus of reference for all relevant issues.

[38] *Gauweiler v Deutscher Bundestag* (C-62/14) EU:C:2015:400; [2016] 1 C.M.L.R. 1.